IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No 27 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF CENTRAL EXCISE AHMEDABAD-I

Versus

CONTINENTAL CHEMICALS

Appearance:

1. CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No. 27 of 2002
MR DEVANG NANAVATI for Petitioner No. 1
RULE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 09/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

The Commissioner of Central Excise, Ahmedabad-I has filed this application under Section 35H(1) of the Central Excise Act, 1944 for directing the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai to refer the following question of law for our opinion:-

"Whether the CEGAT has erred in holding that the Rule 173Q is not applicable in the instant case and instead 226 of Central Excise Rules, 1944 should have been applied?"

2. We have heard Mr Devang Nanavati, learned counsel for the applicant - revenue and Ms Amisha Shah, an employee of the respondent - assessee.

3. Having heard the parties, we do feel that a question of law arises from the order of the Tribunal in view of the reasoning adopted by the Tribunal. However, in the peculiar facts and circumstances of the case and more particularly in view of the smallness of the amount involved, which is only Rs.15,000/-, and in view of the fact that the Commissioner (Appeals) had accepted the explanation given by the assessee on facts that the stock in question was the production of 27th December, 1992 when the Central Excise Officers paid a surprise visit in the evening finding 363 kgs. of Paracetamol IP grade valued at Rs.58,080/- not entered into RGI register, and the finding given by the Commissioner (Appeals) that the assessee was to make entries in the said register at the end of the day, we are not inclined to entertain this application.

4. We do, however, make it clear that the Tribunal was not justified in making the following observations:-

"The ground in the appeal is that the provisions of Rule 173Q would be attracted for the reason that the goods were are not accounted for in the R.G. 1 register. Clause (b) of Rule 173Q refers to "a manufacturer or producer, registered person of a warehouse or a registered dealer who does not account for excisable goods manufactured, produced or stored by him". It is not possible to agree that this clause takes into its scope goods which are physically present but details of which are not entered in the accounts maintained by the manufacturer. The phrase "accounting for" is not synonymous with the phrase "entered in the account". Accounting for anything means being answerable for or explaining a particular course

> of conduct. A person thus may be asked to account for his failure to do a particular act that he was required to do. In the context of the rule,it is clear that the expression is used in such a manner as to cast a burden on the manufacturer or other person concerned to show the existence of the goods that he has manufactured or received, or to offer a valid explanation for their absence. Acceptance of the meaning attributed to it by the Commissioner would then necessarily lead to the conclusion that there are two provisions in the rules for dealing with the same contravention, rule 173Q and rule 226. The latter rule provides for confiscation of goods that are not entered in the account to be maintained by a manufacturer. It is this rule that in fact should have been applied and had it been cited in the show cause notice, I would have upheld the confiscation. However, the show cause notice does not propose confiscation under Rule 226. It does not even cite it. In these circumstances, I am unable to interfere with the order of the Commissioner (Appeals).

5. The Tribunal's order appears to be bristling with several misconceptions, if not illegalities, on the question of interpretation and applicability of Rules 173Q and 226 of the Central Excise Rules, 1944. For instance, the Tribunal has observed that even if the fine under Rule 173Q could not be levied, the fine under Rule 226 also could not be levied merely because the show-cause notice did not propose confiscation under Rule 226.

6. Since the situation at hand would be covered by Rule 226 even if it is not covered by Rule 173Q and the provisions of Rule 226 are less stringent in the matter of their applicability as well as the consequences, the Tribunal was not justified in observing that non-mention of Rule 226 in the show-cause notice would disentitle the authorities from invoking Rule 226 even if Rule 173Q does not apply. Of course, different considerations would arise if only Rule 226 is mentioned in the show cause notice and Rule 173 Q is invoked in the final order. The reason is the provisions of Rule 173Q provide for harsher penalties.

7. In the facts and circumstances pointed out in para 3 hereinabove as found by the Commissioner (Appeals) whose order the Tribunal has confirmed, albeit for

different reasons, we do not entertain this application.

8. Subject to the aforesaid observations, the application is disposed of. Rule is discharged.

(M.S. Shah,J) (K.A. Puj,J)
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